IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-373

CITY OF VIRGINIA BEACH,

Appellant,

v.

HENRY E. HOWELL, JR., et al.,

Appellees.

CITY OF VIRGINIA BEACH,

Appellant,

v.

STANFORD E. PARRIS, et al.,

Appellees.

CITY OF VIRGINIA BEACH,

Appellant,

v.

CLIVE L. DUVAL, II, et al.,

Appellees.

PETITION FOR REHEARING

Now comes the appellant, City of Virginia Beach, and petitions this Court for a rehearing, pursuant to Rule 58 of the Rules of the Supreme Court, of that portion of the Court's decision which affirmed the order of the United States District Court for the Eastern

District of Virginia relating to the reapportionment of the Virginia Senate.

Introduction

In its interlocutory order dated July 2, 1971, the District Court declared unconstitutional the General Assembly's reapportionment plans for the Virginia House of Delegates and Senate. This Court, in an opinion by Mr. Justice Rehnquist dated February 21, 1973*, held the General Assembly's House of Delegates plan constitutional, reversing the District Court's conclusion to the contrary. No rehearing is requested as to this aspect of the case.

In the opinion this Court also affirmed the District Court's holding that the Virginia reapportionment plan for the Senate was unconstitutional and approved the District Court's consolidation of the Fifth, Sixth and Seventh Senatorial Districts of Virginia into one large multimember district. This

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* Mahan, Secretary, State Board of Elections v. Howell, together with City of Virginia Beach v. Howell and Weinberg v. Prichard.

Court found that the District Court had not abused its discretion in consolidating these districts because the lower court was "confronted with plausible evidence of substantial malapportionment with respect to military personnel, the mandate of this Court that voting discrimination against military personnel is constitutionally impermissible, Davis v. Mann, supra, at 691-692, and the fear that too much delay would have seriously disrupted the Fall 1971 elections." (Slip Opinion at 17). A rehearing is requested as to this portion of the Court's February 21, 1973, decision.

Statement of Grounds for Rehearing

On the Senate side of this appeal the issue was simply whether the District Court had acted properly on the basis of the unique circumstances in Norfolk where large numbers of military personnel are stationed. The facts, not legal precedent, were largely dispositive of the issue and for this reason the City of Virginia Beach now seeks a rehearing. The Court's opinion suggests that the decision to affirm the District Court's order was made under a misconception of the true situa-

tion. The opinion states:

> "Under the [Senate] plan, the City of Virginia Beach was added to the City of Norfolk and the entire area was divided into three single-member districts which the court below found conformed almost ideally, numerically, to the 'one person, one vote' principle." (Slip Opinion at 14) (emphasis added).

This statement is inaccurate. As stated in the opening briefs of the City of Virginia Beach (at 7, 30) and the Commonwealth of Virginia (at 7) and as appears in the Joint Appendix (at 56), only 40,195 of its 172,106 citizens, not the entire area of Virginia Beach, were added to Norfolk. These 40,195 were to vote with 75,764 Norfolk citizens in the Seventh Senatorial District under the General Assembly's plan and the remaining 131,911 were to vote either in the Eighth Senatorial District (population 116,528, all citizens of Virginia Beach) or in the Fourteenth Senatorial District (population 116,084, comprising 15,383 citizens of Virginia Beach, 7,111 citizens of Nansemond County and 89,580 citizens of the City of Chesapeake).

The consolidation of the Fifth, Sixth and Seventh Senatorial Districts by the District Court

results in a much larger dilution of the Virginia Beach senate vote than would be the case if the facts were as stated in this Court's opinion. The 40,195 citizens of the City of Virginia Beach who would have voted for one senator with 75,764 citizens of Norfolk must now vote for three senators with the entire 307,951 population of Norfolk. Prior to the consolidation they were outnumbered by Norfolk citizens approximately 2 to 1; after consolidation they are outnumbered by approximately 8 to 1 and have virtually no voice in the election of senators from the consolidated district.

This Court's error of fact takes on added significance on page 15 of the Slip Opinion where it is stated:

> "The court had before it evidence that about 18,000 lived outside the Fifth District but within the Norfolk and Virginia Beach areas which, if true, indicated a malapportionment with respect to such personnel."

The evidence, however, was somewhat different. A zip code sample of 544 sailors conducted by the Navy (App. 138-40) did indicate that approximately half of

the naval personnel assigned for census purposes to Census Tract 000999 lived outside the Fifth Senatorial District. But there was no evidence that all who lived outside the Fifth Senatorial District lived within the Cities of Norfolk and Virginia Beach, much less in the Fifth, Sixth and Seventh Districts. On the contrary, the Navy's survey indicates that almost half did not. As stated in a footnote to the Commonwealth's opening brief (at 36):

> "Even assuming a degree of accuracy in Reed's survey, his results show that of the 21,600 who were enumerated as home-ported in the Fifth but lived outside such district, 48%, or over 9,500 persons, maintained residences outside the Fifth, Sixth or even the Seventh Senatorial Districts."

Thus, the District Court's consolidation of the three single member senatorial districts only partially solved the problem created by the large numbers of naval personnel stationed in Norfolk. Almost half of the approximately 18,000 sailors who do not live in the Fifth District do not live in the Sixth or Seventh either. According to their zip codes, these sailors live in portions of Virginia Beach outside the newly

consolidated district and in other areas of Tidewater. These other areas, including the City of Virginia Beach, remain underrepresented -- under the consolidation Norfolk has retained all the political influence represented by the naval personnel stationed there.

Conclusion

This Court's affirmance of the District Court's consolidation of the three senatorial districts is based on its belief that "the court corrected the disparities by establishing one multimember district ..." (Slip Opinion at 15). But this was not the case. Moreover, the consolidation seriously reduces the voice of 40,195 Virginia Beach citizens in the election of a senator. The City of Virginia Beach respectfully asks that the Court reconsider its partial affirmance of the District Court's order on the basis of the correct facts.

Certificate

I hereby certify that this Petition for Rehearing is presented in good faith and not for the purpose of delay.

Respectfully submitted,

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Dated: March 16, 1973

SUPREME COURT OF THE UNITED STATES

Nos. 71–364 AND 71–373

John S. Mahan, Secretary, State Board of Elections, et al., Appellants,
71–364 *v.*
Henry E. Howell, Jr., et al.

City of Virginia Beach, Appellant,
71–373 *v.*
Henry E. Howell, Jr., et al.

On Petition for Rehearing.

[April 2, 1973]

Treating the petition for rehearing in #71-373 as a motion to modify the Court's opinion, the following order is hereby entered:

The motion of the ~~petitioner~~ appellant, City of Virginia Beach, to modify this Court's opinion is hereby granted. The first paragraph in Part II of the opinion is amended by adding "a portion of" after the phrase "Under the plan," in the second sentence thereof, and by striking the phrase "encompassing the cities of Norfolk and Virginia Beach" in the last sentence of the paragraph, substituting therefor the following phrase: "encompassing the City of Norfolk and a portion of Virginia Beach."

MR. JUSTICE POWELL took no part in the consideration or decision of this order.